IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 63467-4-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
HUBERT A. CHEVARA, JR.,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: June 1, 2010
	)	

Lau, J. — A jury convicted Hubert Chevara of felony violation of a court order—domestic violence and interfering with domestic violence reporting. On appeal, Chevara argues that he received ineffective assistance of counsel because his trial counsel did not object to prior bad act evidence. Because he cannot show deficient performance or prejudice, we affirm the felony court order violation conviction. And the State concedes that the interfering with domestic violence reporting conviction should be dismissed because it is impossible to determine which of three means of committing the crime the jury relied on. We agree, accept the concession of error, and dismiss this conviction.

FACTS

In August 2006, Jacquelyn Willimon moved into a West Seattle apartment and Chevara moved in with her. In June 2008, a judge issued two orders prohibiting Chevara from contacting Willimon based on a finding that Chevara had "been charged with, arrested for, or convicted of a domestic violence offense . . ." Br. of Appellant, Appendix B. Nevertheless, Willimon allowed Chevara to continue to live with her.

On November 15, 2008, Willimon asked Chevara to leave the apartment, but he refused. The next day, Willimon again asked Chevara to leave because she was feeling "frustrated and hurt and like I wanted him to just go away for a while until I was feeling safe again." 2 Report of Proceedings (Mar. 3, 2009) (RP) at 56. Chevara began packing his things, but in the process, he took several of Willimon's belongings. Willimon threatened to call the police and a scuffle ensued. Chevara grabbed Willimon's hand, breaking in half the cell phone she was holding. Chevara hit Willimon in the face with the phone and pushed her to the floor. Chevara then left, and Willimon called the police from a neighbor's apartment.

The State charged Chevara with felony violation of a court order—domestic violence (count I) and interfering with domestic violence reporting (count II). The parties stipulated to the admission of the two no-contact orders (NCOs). A jury found Chevara guilty on both counts and returned a special verdict finding that count I was a crime of domestic violence.

ANALYSIS

Chevara argues that he received ineffective assistance of counsel based on his trial counsel's failure to object to 14

instances of allegedly improper "prior bad act" testimony. The State replies that Chevara has failed to establish either deficient performance or prejudice.

To demonstrate ineffective assistance of counsel, Chevara must satisfy both prongs of a 2-prong test. See State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). But we need not address both prongs if he makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1986). First, Chevara must establish that his counsel's representation was deficient. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To show deficient performance, he has the "heavy burden of showing that his attorneys 'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment . . . . '" State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). His attorney's conduct must have fallen below an objective standard of reasonableness considering all the circumstances. State v. Meckelson, 133 Wn. App. 431, 436, 135 P.3d 991 (2006). Matters that go to trial strategy or tactics do not show deficient performance; Chevara bears the burden of establishing there were no legitimate strategic or tactical reasons behind his attorney's choices. State v. Rainey, 107 Wn. App. 129, 135–36, 28 P.3d 10 (2001). Where a claim of deficiency rests on counsel's failure to object, a defendant must show that an objection would likely have been sustained. See State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Second, Chevara must show that his attorney's deficient performance resulted in prejudice such that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been

different." Hendrickson, 129 Wn.2d at 78. Courts employ a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335.

Chevara argues that he received ineffective assistance of counsel based on his trial counsel's failure to object to 14 instances of allegedly improper testimony. The testimony generally falls into two categories: (1) testimony regarding Chevara's prior assaults on Willimon and (2) testimony stating that Chevara was previously incarcerated. The State responds that the decision not to object was tactical, an objection would not have been sustained, and Chevara cannot show prejudice.

Under ER 404(b), evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, such evidence may be admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). The list of "other purposes" for admitting evidence under ER 404(b) is not exclusive. State v. Kidd, 36 Wn. App. 503, 505, 674 P.2d 674 (1983).

Here, defense counsel had a reasonable tactical reason not to object to testimony regarding Chevara's previous assaults and incarceration. The two NCOs were admitted into evidence by stipulation as exhibits, and both informed the jury that Chevara had been previously convicted of a domestic violence offense.

> Based on the certificate of probable cause and/or other documents contained in the case record, testimony, and the statements of counsel, the court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense . . . .

Br. of Appellant, Appendix B. And both orders were labeled "post-conviction." Given this previously admitted evidence, counsel's tactical decision not to object because the jury learned nothing new from Willimon's testimony is objectively reasonable. Furthermore, counsel could have reasoned that an objection would only serve to further highlight the prior assaults in the minds of the jury and encourage them to think they related to still other assaults not described in the NCOs. Similarly, because both NCOs are labeled "post-conviction," they informed the jury that Chevara had likely been previously incarcerated. As such, counsel could have decided that objecting to testimony about Chevara's prior incarceration provided minimal tactical advantage.

Furthermore, given the stipulation to admit the NCOs, it is unclear that the judge would have sustained an objection. Where a claim of deficiency rests on a failure to object, the defendant bears the burden of showing that the objection would have been sustained. See Saunders, 91 Wn. App. at 578. It is unlikely that the judge would have sustained the objection because the evidence was already properly before the jury. And we employ a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335. On this record, Chevara has not met the "heavy burden of showing that his attorneys 'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment . . . .'" Howland, 66 Wn. App. at 594 (quoting Strickland, 466 U.S. at 687).

And Chevara cannot show prejudice. The jury was already aware that Chevara had been convicted of two acts of domestic violence. Chevara fails to demonstrate that the result of the trial would have been different absent Willimon's duplicative testimony concerning the prior assaults and

Chevara's incarceration. And Willimon provided no information beyond what was conveyed in the NCOs. Her testimony did not give details of the assaults or the incarceration; she merely explained that Chevara had previously assaulted her and had been in jail. Furthermore, the State never referenced the prior acts in closing, nor specifically elicited information about them in direct examination.

Because we conclude that counsel's representation was neither deficient nor prejudicial, we do not address the State's remaining arguments regarding ineffective assistance.

Alternative Means

Chevara advances several challenges, including "alternative means," that he argues require count II be dismissed. Consistent with the right to a unanimous verdict, if a defendant is charged with committing a crime by more than one alternative means, the State must present substantial evidence to support each of the means charged. State v. Arndt, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976). But if the evidence is insufficient to support a verdict on each of the alternative means submitted to the jury, the conviction must be reversed unless we "can determine that the verdict was based on only one of the alternative means and that substantial evidence supported that alternative means." State v. Rivas, 97 Wn. App. 349, 351–52, 984 P.2d 432 (1999).

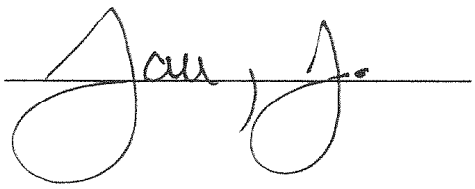
Here, the State concedes that count II should be dismissed because "given the testimony presented at trial, it is impossible to determine which of the three means was relied upon by the jury." Br. of Resp't at 24. We accept the concession of error and dismiss the conviction for interfering with domestic violence reporting.

Statement of Additional Grounds

Chevara raises two additional complaints in his statement of additional grounds. First, he argues that his right to a speedy trial was violated because he "was in custody 22 days before I went to arraignment." Second, he argues that his right to due process was violated because he was not present at his omnibus hearing.

While a defendant is not required to cite to the record for his statement of additional grounds, "this court is not required to search the record to find support for the defendant's claims." State v. Meneses, 149 Wn. App. 707, 716, 205 P.3d 916 (2009), review granted in part, 167 Wn.2d 1008 (2009). Here, Chevara does not sufficiently explain the underlying facts to enable us to review his claims.

We affirm Chevara's felony violation of court order and dismiss the interference with domestic violence reporting conviction.



WE CONCUR: